

Anthonymsamy Vs. Christoraj

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Court : Chennai

Decided On : Apr-02-2013

Judge : S.Manikumar

Appellant : Anthonymsamy

Respondent : Christoraj

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATE:

02. 04.2013 CORAM THE HONOURABLE MR.JUSTICE S.MANIKUMAR CRP (NPD) No.1056 of 2013 Anthonymsamy .. Petitioner ..Vs..

1. Christoraj

2. Leela Mary .. Respondents Prayer: This Civil Revision Petition is filed under Article 227 of the Constitution of India, against the order dated 25.09.2012 passed in I.A.No.20 of 2012 in AS 1 /2011 on the file of the learned Principal District and Sessions Judge, Ariyalur, dismissing the IA No.20 of 2012 filed by the petitioner seeking to amend the plaint filed in OS.No.9 of 2005 on the file of the learned Sub Judge, Ariyalur. For Petitioner : Mr.Thirupathiraj O R D E R Being aggrieved by the dismissal of I.A.No.20 of 2012 dated 25.09.2012 in A.S.No.11 of 2011 filed under Order 41 Rule 3 CPC and under Order 6 Rule 17 CPC, the plaintiff has filed the Civil Revision Petition. Provision, Order 41 Rule 3, CPC is extracted hereunder. "Rejection or amendment of memorandum

(1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment. [3A . Application for condonation of delay

(1) When a appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice hereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule

(1) the Court shall not made an order fact the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal.]"

2. Material on record discloses that a suit in O.S.No.9 of 2005 has been filed by the revision petitioner, for the following reliefs: "

9. Therefore, it is prayed on behalf of the plaintiff that 1.that the Hon'ble Judge shall pass orders against the defendants cancelling the sale deed dated 09.04.2003, executed by the 1st defendant in favour of the 2nd defendant in respect of the property belonging to the plaintiff, as invalid. 2.granting permanent order of injunction against the defendants restraining the defendants, his men,

agents, from interfering with the enjoyment of the plaintiff in the suit property and 3.that the cost of the suit shall be given by the defendant to the plaintiff and grant such and other relief as the court may deem fit and proper, in the circumstances of the suit.."

3. Written statement has been filed, by the defendants. Upon considering the pleadings the learned Subordinate Judge, Ariyalur has framed the following issues for consideration. "1. Whether the sale deed dated 09.04.2003 executed by the 1st defendant in favour of the 2nd defendant has to be held as invalid, and cancelled as prayed for, in this plaint?.

2. Whether the plaintiff is entitled to an order for a permanent injunction, as per the plaint averments? 3. Whether the defendants are right in contending that the sale deed dated 09.04.2003, has come into force? 4. To what relief the plaintiff is entitled to?" 4. Upon consideration of the pleadings and evidence adduced by both parties, the learned Subordinate Judge, Ariyalur, by judgment and decree dated 09.03.2010, has dismissed the suit. Being aggrieved by the same, the plaintiff has preferred an appeal in A.S.No.1 of 2011 on the file of the learned Principal District Judge, Ariyalur. In the appeal, just prior to arguments, the plaintiff / revision petitioner has filed I.A.No.20 of 2012 for an amendment. In the supporting affidavit, he has contended that while filing the original suit, in the Court below, he had furnished certain particulars to his counsel. But his counsel has filed the suit, without mentioning those particulars. In the supporting affidavit, the revision petitioner has contended that he is a illiterate person, not aware of the particulars mentioned in the plaint and when he had asked his counsel, as to why certain particulars were not included, his counsel replied that the same were not necessary for the suit and only at the time, when arguments were to be made, in the appeal, the counsel for the revision petitioner/appellant, in the lower Court, asked him, for certain particulars and accordingly, relevant documents were traced out recently and in the abovesaid circumstances, the petition for amendment would not be filed. In sum and substance, the revision petitioner/plaintiff, has pleaded ignorance and alleged negligence on the part of his lower Court counsel.

5. The defendants / respondents in their counter affidavit have contended that the petition to amend the plaint, at the appellate stage is not maintainable. The reasons assigned in the petition for amendment of plaint, at the appellate stage, are false. According to the respondents the proposed amendment was nothing but an after thought, to get over the admission made by the plaintiff in the plaint. According to the defendants / respondents, by way of proposed amendment, the plaintiff has attempted to erase the entire admitted facts and introduce a new case. The defendants / respondents, have further stated that it is not open to the plaintiff / revision petitioner to allege ignorance of pleadings, made in the suit, when he had already adduced oral evidence in the suit. The defendants / respondents, have also submitted that amendment cannot be allowed, after the commencement of trial, especially, when the facts sought to be introduced, by way of an amendment were very well, within the knowledge of the plaintiff. According to them, the very purpose of filing an application under Order 41 Rule 3 and Order 6 Rule 17, CPC, is only to drag on the proceedings, to add new facts and to erase the admission in the plaint averments, which cannot be allowed.

6. Adverting to the above said rival contentions, the Court below, has found that the reasons assigned were not convincing. The Court has held that the contention that the learned counsel who represented the plaintiff in the suit, did not incorporate certain particulars in the plaint, cannot be countenanced and if there was any failure or negligence on the part of his counsel, to incorporate certain particulars, the revision petitioner / plaintiff, should have suitably instructed his counsel, to take steps to amend the plaint, at the stage of the trial itself and not at the appellate stage and that too, when the appeal was posted for arguments.

7. Upon perusal of the averments in the supporting affidavit filed in I.A.No.20 of 2012, filed seeking for an amendment, the learned Principal District and Sessions Judge, Ariyalur, has noticed that the revision petitioner, had not made any averments in the said petition, as to whether he was prevented from making any amendment, during the pendency of the suit and further observed that the plaintiff was not diligent. Though, a serious allegation of negligence, has been made against his previous counsel, who represented him in the trial Court, the Court below has found that there was absolutely no evidence or material on record to

support the said contention. Observing that the proposed averment made in I.A.No.20 of 2012 would virtually undo the admission, made in the original plaint and would also amount to introduction of a new case, the Court below has compared paragraphs Nos.3 and 4 of the averments in the plaint and also the proposed amendment, sought for, which are extracted hereunder. "3. The property mentioned hereunder belongs to the plaintiff through purchase. The suit property was purchased by the plaintiff from Aranganathan and parties on 16.08.1996. The suit property, is a vacant plot, at present. In respect of the hand loan obtained by the plaintiff from the 2nd defendant in this suit, on various occasions, an amount of Rs.90,000/- had to be paid. When the 2nd defendant demanded for the amount along with the interest, in a situation not being able to pay the principal along with the interest, the 2nd defendant asked the plaintiff to execute a mortgage deed for Rs.2,00,000/- (Rupees two lakhs) with the interest being Rs.20,000/- and principal Rs.90,000/- the plaintiff, executed a mortgage deed in respect of the suit property in favour of the 2nd defendant, on 25.07.2001. Its copy is annexed herewith. The clauses in the said deed shall be considered part of this document. Since the sons of the plaintiff were employed in foreign country and since the plaintiff is aged and he could not maintain the suit property, the plaintiff, in order to maintain the property, appointed the 1st defendant as the power agent and executed a registered power of attorney deed on 20.12.2002. The clauses mentioned therein, shall also be included as part of this. The aforesaid deed of power of attorney was executed with a condition that the 1st defendant, while carrying out the works, should maintain the accounts for the income and expenditure and should show the same to the plaintiff. At that time, the sale deed of the plaintiff regarding the suit property was also handed over to the 1st defendant. Therefore, the Xerox copy of the same has been herewith enclosed.

4. In this circumstance, the 1st defendant based on the deed of power of attorney executed by the plaintiff on 20.12.2002, misused the document and on 09.04.2003, negotiated a sale in favour of his mother, the 2nd defendant, fixed a sale consideration of Rs.2,50,000/- made over the mortgage deed executed by the plaintiff in favour of the 1st defendant and asked her to pay Rs.41,000/- towards interest for the said amount and the remaining Rs.9,000/- having received by the 1st defendant to meet the expenses of the plaintiff's family and thus he executed a

sale deed citing false reasons. If the deed of power of attorney executed by the aforesaid plaintiff in favour of the 1st defendant and the sale deed executed by the 1st defendant in favour of the 2nd defendant are compared, the forgery committed by the 1st defendant would be clearly revealed. Only when the 1st defendant lodged a false complaint against the plaintiff, the plaintiff came to know about the sale deed executed by the 1st defendant in favour of the 2nd defendant. Therefore, the plaintiff, cancelled the deed of power of attorney executed by the plaintiff in favour of the 1st defendant, on 01.12.2003 and informed the same to the 1st and 2nd defendants directly within due time.

9. Now the averments made in the proposed amendment runs as follows :- Details to be amended :- In the grounds of the appeal, in para 11, next to the 0paragraph 10, it is to be amended :

10. Santhanasamy, the son of the appellant and the 1st respondent were close friends. The aforesaid Santhanasamy worked in a foreign country, earned money and sent it to the 1st respondent through persons. Owing to the close friendship existed between the Santhanasamy and the 1st respondent, the family of the respondent and the family of the appellant were intimate as relatives. They had been giving the money to the appellant, which was sent by the aforesaid Santhanasamy from the foreign country. The 1st respondent purchased the suit property, with the amount sent by Santhanasamy and got executed the deed of sale, in the name of the appellant, on 16.08.1996. The 1st respondent and his father gave the acknowledgment in writing, with regard to the income and expenditure for the year 1996-1997 to the family of the appellants. The appellant had misplaced the acknowledgment regarding the income and expenditure for the subsequent period. He will file the same as and when he gets it. The 1st respondent, who took advantage of the enormous trust reposed by the family of the appellant on the family of the respondents, included the interest additionally, the amount Rs.20,000/- by enhancing the amount, more than the amount sent by Santhanam, the 1st respondent and got executed a mortgage deed on 25.07.2001, for the amount Rs.2,00,000/-, in the name of his mother/2nd respondent. Later on, Santhanasamy, the son of the appellant returned to India from the foreign country, in the year 2002. After Santhanasamy, the son of the

appellant had returned to India, he and the 1st respondent verified the accounts of income and expenditure, it was found out that the 1st respondent had to give Rs.5,00,000/- and difference of opinion arose between the 1st respondent and Santhanasamy. Immediately, since the 1st respondent gave pressure to the appellant, insisting him to discharge the mortgage loan amount, Rs.90,000/- which was due to the 1st respondent, under the mortgage deed, executed. The 1st respondent, who did not accept the statement of the appellant that he would make the amount ready and give, insisted the appellant and his son, Santhanasamy to execute a sale deed in respect of the suit property as surety for the amount Rs.90,000/-, the amount due to the 1st respondent, who came with the papers of the deed, the appellant refused. Since, the 1st respondent immediately coerced the appellant and his son, Santhanasamy to execute a deed of power of attorney in his name, with regard to the suit property, till the loan amount is discharged with interest, the appellant, without any other alternative, in view of his confidence on the respondent, executed a deed of power of attorney, in the name of the respondent, on 20.12.2002. The said deed was attested by Santhanasamy. When the accounts of income and expenditure with regard to the amount sent by Santhanasamy, the son of the appellant to the 1st respondent, was verified, since the aforesaid Santhanasamy asked the 1st defendant to return the amount Rs.5,00,000/- given by him additionally, the 1st respondent registered a false complaint against the aforesaid Santhanasamy in Jeyamkondam Police Station on 03.04.2003. With the assistance of the Inspector of Police of the aforesaid police station, the case in Crime No.199/2003 u/w 387 I.P.C. was registered against Santhanasamy. The Inspector of Police, being a puppet in the hands of the 1st respondent voluntarily registered a case in Crime No.200/2003 against Santhanasamy, on 04.04.2003 u/s 4(1) (102) Cr.P.C. r/w sections 4 and 5 I.E.S. Act, arrested Santhanasamy, the son of the appellant and another person and imprisoned them under N.S. Act. While the appellant took action to save his son, Santhanasamy and when he was busy for the same, the 1st respondent fraudulently executed Ex.B.4, the deed of sale in favour of his mother, the 2nd respondent, by using the Ex.B.3, the deed of general power of attorney executed in favour of the 1st respondent regarding the suit property, as surety for the amount of Rs.90,000/-. The aforesaid Ex.B.4, sale deed is a disputed document

created for the sake of this case. The aforesaid Ex.B.4 is the document, created by the 1st respondent fraudulently, by deceiving the appellant and committing breach of trust, by using Ex.B.3, General Power of Attorney executed in favour of the 1st respondent, who instilled confidence in the appellant. The aforesaid Ex.B.4 document is not valid. As per Ex.B.4, the respondents do not have any right of enjoyment. The case under Goondas Act was cancelled on 06.06.2003 after it was clarified in the hearing of the case under Goondas Act filed against Santhanasamy, the son of the appellant that there was transaction of income and expenditure between the family of the appellant and the 1st respondent. Later on, the appellant, who came to know that Ex.B.4 document was created fraudulently, out of Ex.B.3, the General Power of Attorney, executed by the appellant, lodged a complaint against the 1st respondent, with the District Superintendent of Police, Perambalur on 26.10.2003. Since action was not taken against the 1st respondent, the appellant filed a petition in the High Court, Madras praying to take action on the aforesaid petition (Complaint) and obtained orders. With the help of Ex.B.3, document, obtained by the 1st respondent from the appellant and committed breach of trust, the 1st respondent fraudulently created Ex.B.4, document. The aforesaid Ex.B.4, document is a disputed one. Since, Ex.B.4, document was fraudulently created, it is not sustainable in law. The respondents cannot claim any right through Ex.B.4. Ex.B.4 was not made for the transfer of right. By misusing Ex.B.3 document, which was executed on the basis of trust, in order to grab the suit property from the appellant, the respondent committed breach of trust and showed the market value of the property very less in the name of the 2nd respondent and created Ex.B.4 document fraudulently, therefore, Ex.B.4, document is not sustainable".

8. Upon comparison of the averments initially made in the plaint and the proposed amendment, the Court below, has found that the revision petitioner has altogether introduced a different and new case, involving one Sandanasamy, son of the petitioner and the dominant role played by him, in relation to certain documents relied on by the other side. Upon comparison of the averments made in the original plaint and the proposed amendment, the Court below has observed that in the averments made earlier, there was absolutely no reference to the role played by the son of the petitioner. By substitution of the pleading, the revision petitioner

has attempted to introduce a new fact.

9. Considering the question as to whether an amendment petition, can be allowed at the appellate stage or after the completion of pleadings, the Court below, has observed that, as per the proviso to Order 6 Rule 17 CPC, the only eventuality, where an amendment could be allowed, is that in spite of due diligence, the party could not have raised the matter, before the commencement of the trial.

10. Upon considering the material on record, the Court below has found that the revision petitioner has neither pleaded nor proved that inspite of diligent efforts, he could not file the petition before the commencement of the suit. Adverting to the above said aspect, the Court below has also considered a decision of this Court in S.Rajendran Vs. K.Kanniah and Others, reported in 2010 (1) CTC 837.wherein, it has been held that in the absence of such pleadings and proof, the petition seeking amendment is liable to be dismissed.

11. The court below has also considered yet another decision in Gurusamy Gounder Vs. Muthusamy Gounder and Others, reported in 1999 (3) MLJ 379.wherein, this Court has held that amendment should not be allowed, if it is capable of wiping out the admission already made by the parties. At para No.11 of the abovesaid judgment, this Court held as follows: "In the sense, what the plaintiff wants is to raise an inconsistent plea to what he has already raised and if the amendment is allowed, it will amount to allowing plaintiff to withdraw the admission, which he has already made, which will cause manifest injustice to the defendants." 12. Let me consider some of the decisions, dealing with amendment of pleadings. (i) In Sampath Kumar Vs. Ayyakannau and Another, reported in 2002 (4) CTC 189.addressing the issue relating to amendment of pleading and the principles to be followed, the Supreme Court, at Paragraph Nos.7, 9 and 10, held as follows.

7. In our opinion, the basic structure of the suit is not altered by the proposed amendment. What is sought to be changed is the nature of relief sought for by the plaintiff. In the opinion of the Trial Court it was open to the plaintiff to file a fresh suit and that is one of the reason which has prevailed with the Trial Court and with the High Court in refusing the prayer for amendment and also in dismissing the

plaintiff's revision. We fail to understand, if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit. In the facts and circumstances of the present case, allowing the amendment would curtail multiplicity of legal proceedings.

9. Order 6 Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amendment. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed. (See observations in *Siddalingamma and Anr. v. Mamtha Shenoy* [AIR 2000 SC 2896].(ii) In *Person Publicity rep. by its Partner K.A.Ajmal Bhukari, Vs. The Corporation of Madras rep. by its Commissioner* reported in 2003 (1) CTC 219. A Division Bench of this Court held that amendment would not be allowed if it changes the cause of action or

creates new claim or alters materials facts. Following Vineet Kumar Vs. Mangal Sain Wadhera, reported in 1984 (3) SCC 352.the Division Bench, at paragraph No.11, has further observed as follows: "11. Normally, amendment is not allowed if it changers the cause of action. No material could ever be amended after the period of limitation had expired. But, if the amendment does not constitute an additional of new cause of action or raise a new case, but amounts to no more than adding to the facts already on the records the amendment would be allowed even after the statutory period of limitation. Such a view is taken by the Apex Court the decision in Vineet Kumar v. Mangal Sain Wadhera [1984 (3) SCC 352]" (iii). In. P. Lakshmanan Vs. M.Krishnappa and another, reported in 2003 (3) CTC 454.on the facts and circumstances of the reported case, a learned single Judge of this Court, observed as follows: "8. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, needless to mention that it is an Interlocutory Application filed under Order 6 Rule 17 CPC praying for an amendment of the plaint to be made when the matter was pending on appeal before the appellate Court. Though it is a well settled law that a formal amendment without either changing the cause of action or altering the structure of the plaint could be allowed at any stage of the suit or even in rarest of rare cases at the time of the filing of the appeal, here is a case in which the petitioner has sought for an amendment to be carried out during the pendency of the appeal which according to the respondents is not only highly belated since the very same purpose for which the amendment is sought to be introduced into the plaint was available for the petitioner, admittedly from his pleadings, right from the time that he filed the suit, but, having not chosen to file an application of this sort during the pendency of the suit particularly while the suit was under process and even failing to do the same along with the appeal memo. at the time of preferring the appeal, now, during the pendency of the appeal suit, the petitioner has come forward to file an application of this sort before the appellate Court which has been dismissed for want of credibility and reasons on the part of the petitioner to have come forward to file such an application at the time when he had lost all his opportunities in the suit." (iv). Explaining the distinction between an amendment under Order 8 Rule 9 and Order 6 Rule 17, in P.A.Jayalakshmi Vs. H.Saradha and Others, reported in 2009 (4) CTC 201.the Supreme Court, after considering the

provision and the effect of amendment to the Code of Civil Procedure, held as follows, "8..... Order VI Rule 17 speaks of amendment of pleadings whereas Order VIII Rule 9 provides for subsequent pleadings by a defendant. The distinction between the two provisions is evident. Whereas by reason of the former unless a contrary intention is expressed by the court, any amendment carried out in the pleadings shall relate back to the date of filing original thereof, subsequent pleadings stand on different footings.

10. Ordinarily at such a belated stage, leave for filing additional written statement is usually not granted. We may notice that one of the plaintiffs was examined on 1.3.2007. It is accepted at the bar that despite the fact that the appellant is said to have discovered the existence of the Will on or about 5.2.2007, no question was put to the said witness with regard to the said Will or otherwise. It is only at a later stage that the aforementioned application for grant of leave to file additional written statement was moved. There cannot be any doubt or dispute that the courts should be liberal in allowing applications for leave to amend pleadings but it is also well settled that the courts must bear in mind the statutory limitations brought about by reason of the Code of Civil Procedure (Amendment) Acts; the proviso appended to Order VI Rule 17 being one of them. "In *North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (Dead) By LRs.* [(2008) 8 SCC 511], the law has laid down by this Court in the following terms: "16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil* (1957 AIR (SC)

363) which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. (Also see *Gajanan Jaikishan Joshi v. Prabhakar*

Mohanlal Kalwar)" In Bollepanda P. Poonacha & Anr. v. K.M. Madapa [(2008) 13 SCC 179], law is laid down in the following terms : "15. A belated counterclaim must be discouraged by this Court. See Ramesh Chand Ardawatiya v. Anil Panjwani (2003 (4) Supreme 27). We are, however, not unmindful of the decisions of this Court where a defendant has been allowed to amend his written statement so as to enable him to elaborate his defence or to take additional pleas in support of his case. The Court in such matters has a wide discretion. It must, however, subserve the ultimate cause of justice. It may be true that further litigation should be endeavoured to be avoided. It may also be true that joinder of several causes of action in a suit is permissible. The Court, must, however, exercise the discretionary jurisdiction in a judicious manner. While considering that subservance of justice is the ultimate goal, the statutory limitation shall not be overstepped. Grant of relief will depend upon the factual background involved in each case. The Court, while undoubtedly would take into consideration the questions of serious injustice or irreparable loss, but nevertheless should bear in mind that a provision for amendment of pleadings is not available as a matter of right under all circumstances. One cause of action cannot be allowed to be substituted by another. Ordinarily, effect of an admission made in earlier pleadings shall not be permitted to be taken away. See State of A.P. v. Pioneer Builders and Steel Authority of India Ltd. v. Union of India and Himmat Singh v. ICI India Ltd.(2008 (3) SCC 571)" (Emphasis supplied) Yet again, in Vidyabai & Ors. v. Padmalatha & Anr. [(2009) 2 SCC 409], this Court upon taking into consideration the effect of the insertion of proviso to Order VI Rule 17 held as under : "10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under: "Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial." It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint" (v) In J.

Samuel & other Vs. Gattu Mahesh & Others, reported in 2012 (2) CTC 9.:

2012. (2) SCC 300.at paragraph Nos.12, 13 and 14, the Supreme Court, held as follows: "

12) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their pleadings. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that: no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

13) Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term 'Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the

commencement of trial.

14) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit. (emphasis by this Court) (vi). Following J.Samuel's case, my esteemed brother Hon'ble Mr.Justice.Dhanapalan, in a recent judgment, in Minor Balakumaran, through his Natural Guardian, next friend and father, Gnanasoundiran Vs. Gunasekaran, reported in 2012 (5) CTC 3.at paragraph Nos. 7 to 9, held as follows" "7. The primary aim of the Courts is to try the cases on merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the Courts so that the Courts have access to all the relevant information in coming to their decisions. Therefore, at times, it is required to permit the parties to amend their Plaints. No doubt true that Rule 17 of Order 6, CPC, confers power on the Court to amend the pleadings at any stage of the proceedings. However, the Proviso to Rule 17 of Order 6, the party has to necessarily satisfy the Court that he could not have discovered that ground which was pleaded by amendment, in spite of due diligence 8. It is to be noted that the petitioner / plaintiff has come forward with the Interlocutory Application seeking for amendment after commencement of trial. Admittedly, the petitioner has not made out a case that in spite of his due diligence, he could not have filed the Amendment Application before commencement of trial. It is to be noted that the petitioner / plaintiff has categorically stated in para 3 of the Plaint that after the death of Rasi Kandiyar on 4.1.2003, the so-called will had come into effect and she had taken the suit property in her possession and enjoying the same. Therefore, when the suit property was claimed to be in possession of the petitioner, she could not seek for amendment of the plaint as regards, 'recovery of possession' which as rightly held by the Trial Court that it would certainly cause prejudice to the respondent/defendant. However, it is now well settled that no amendment can be allowed after commencement of trial. In recent decision J.

Samuel & other Vs. Gattu Mahesh & Others, reported in 2012 (2) SCC 300.after enunciating all relevant decisions in the field and held in para 23 as under: "23. Though the counsel for the appellants have cited many decisions, on perusal, we

are of the view that some of those cases have been decided prior to the insertion of Order VI Rule 17 with proviso or on the peculiar facts of that case. This Court in various decisions upheld the power that in deserving cases, the Court can allow delayed amendment by compensating the other side by awarding costs. The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications." "9. Having regard to the above categorical decision of the Hon'ble Supreme Court and the ratio laid down therein, it is to be stated that prior to insertion of Proviso clause to Order 6, Rule 17, C.P.C., it was permissible for the Court to allow belated amendment by compensating the other side by awarding costs. But, pursuant to the insertion of the Proviso, no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In view of the insertion of the Provision, the entire object of the amendment introduced in 2002 in CPC is to stall filing of Application for amending the pleading subsequent to commencement of trial to avoid surprises and that the parties had sufficient knowledge of other's case.

13. Minor Balakumaran's case stated supra, is similar to the present case, wherein an amendment petition has been filed in the suit, just prior to the arguments, whereas, in the case on hand, the amendment sought for, is at the appellate stage, just before the date fixed for arguments in the appeal and therefore, this Court is of the view that Minor Balakumaran's case, squarely applies to the facts of the present revision petition.

14. Courts have held that there is no impediment or total bar against an appellate court permitting amendment of pleadings, provided, if appellate Court observes the well known principles subject to which amendment of pleadings are usually granted. The party should offer a reasonable explanation for the delay in making the application seeking amendment and particularly, when such amendment is sought for, at the appellate stage, the party seeking amendment should adduce, strong and valid reasons, as to why the amendment sought for, was not made in

the trial Court.

15. It is true that an amendment can be permitted to avoid, multiplicity of proceedings. But at the same time, courts have held that an amendment cannot be allowed, if it causes prejudice to the right of the party against whom an amendment is sought for. It is also a settled law, that the scope of the appellate Court is to test the correctness of the judgment under the appeal and any benefit or vested right, on account of declaration of the rights, inter se between the parties to the lis, by the trial Court, cannot be allowed to be taken away by allowing in an amendment to the pleadings, at the appellate stage, when the party seeking an amendment could have brought in such amendment, even at the time of the commencement of the trial. An amendment admitting to wipe out the pleadings and admissions of the party, already considered by the trial Court, for the purpose of arriving at a decision, in the suit, cannot be allowed to be substituted with a new case, at the appellate stage, which would certainly cause serious prejudice to the party, against whom the amendment is sought for. The effect of an admission in earlier pleading shall not be permitted to be taken away, by any proposed amendment.

16. Reverting back to the case on hand, it could be seen that the proposed amendment is in fact, an introduction of a new case, as well as wiping out the admission already made by the plaintiff. Though, the learned counsel for the revision petitioner, has contended that the 1st respondent, in order to create a sale deed dated 09.04.2003, has falsely implicated the petitioner in a criminal case, and further contended that pleadings were already available in the original plaint and that the finding of the Court below that there was a lack of diligence is erroneous, the said submissions cannot be countenanced, for the simple reason that, comparison of paragraph Nos.3 and 4 of the original plaint averments, and the proposed amendment, makes it abundantly clear that a new case is sought to be introduced at the appellate stage. Moreover, by virtue of the proviso to Order 6 Rule 17 CPC, one of the important factors to be considered by this Court is whether the party seeking amendment, has pleaded and proved due diligence which determines the scope of the party's constructive knowledge, which as per the Apex Court in Samuel's case, cited supra, is very important, to decide an

application for amendment. As rightly observed by the Court below, except to blame his counsel, no other acceptable and valid reasons have been given, as to why the plaintiff could not bring in an amendment during the trial stage. In the absence of proof, as regards due diligence, as to why the plaintiff could not file an application for amendment during the trial stage, the application moved just prior to the arguments, is nothing but a clear attempt to erase the pleadings and evidence, made by the parties, during trial, to wipe the admission made by the plaintiff, in the pleadings and to gain advantage, for upsetting a judgment and decree, decided against him. The suit has been filed in the year 2005. As stated supra, upon consideration of pleadings and evidence, the suit, has been dismissed on 09.03.2010 and that the application for amendment has been filed on 16.08.2012, after nearly two years, from the date of decree in O.S.No.9 of 2005 and that too, just prior to arguments.

17. The decisions, relied on by the learned counsel for the respondents/defendants squarely apply to the facts of this case. The contention that no prejudice would be caused to the respondents by allowing an amendment cannot be countenanced. In the result, this Court is of the view that there is no manifest illegality in dismissing the application filed for amending the plaint averments, just before the arguments, at the appellate stage. The Civil Revision Petition is dismissed. No Costs. ars

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